

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF VETERANS AFFAIRS

In the Matter of Allan Gansen, Petitioner v.  
City of Minnetrista, Respondent

**ORDERS AND RECOMMENDATION**

An Oral Argument on the Respondent's Motion for Summary Disposition in this matter was conducted by Administrative Law Judge (ALJ) Richard C. Luis on September 28, 2012. The record on the Motion closed on October 22, 2012.

Kelly C. Dohm, Esq., Melchert, Hubert, Sjodin, PLLP, appeared for Allan Gansen, (Petitioner/Employee). Michael J. Waldspurger, Esq., Ratwik, Roszak, & Maloney, PA, appeared on behalf of the City of Minnetrista (Respondent/Employer).

Based on the proceedings herein, and for the reasons noted in the accompanying Memorandum, the Administrative Law Judge issues the following:

**ORDERS AND RECOMMENDATION**

**IT IS ORDERED** that the Respondent's Motion for Summary Disposition is **DENIED**; and

**IT IS ORDERED FURTHER** that the Petitioner's Request for Attorney's Fees is **DENIED**; and

Since the Orders herein, if adopted by the Commissioner of Veterans Affairs, decide the issues currently before the Administrative Law Judge and the Commissioner, **IT IS RECOMMENDED** that the Petition of Allan Gansen be **GRANTED**, in part, and **DENIED** in part, in accordance with the Memorandum below, which is incorporated by reference herein.

Dated this 21<sup>st</sup> day of November, 2012.

/s/ Richard C. Luis

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RICHARD C. LUIS  
Administrative Law Judge

**MEMORANDUM**

On March 19, 2012, the City of Minnetrista (City) discharged Allan Gansen from his position as Water Technician for the City, for alleged misconduct and incompetence. <sup>1</sup> The

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<sup>1</sup> Exhibit 13, Affidavit of Mike Funk.

City's discharge letter indicated that the grounds for discharge were stated in order to comply with the Veterans' Preference Act, Minn. Stat. §197.46.

On May 16, 2012, Mr. Gansen filed a Request for a Veterans' Preference Hearing pursuant to Minn. Stat. §197.46.<sup>2</sup>

On September 4, 2012, the City filed its Motion for Summary Disposition. The Motion alleges that the City did not violate Mr. Gansen's rights under Minn. Stat. §197.46 because it did exactly what the statute requires: It provided Mr. Gansen with written notice of the reasons for his proposed discharge; it provided Gansen with written notice of his rights under the Veterans' Preference Act (VPA); and it offered (and continues to offer) Mr. Gansen the hearing. As a result, the City alleges that there is no statutory basis for Mr. Gansen's Petition and, without that statutory basis, the Commissioner of Veterans' Affairs and/or the Administrative Law Judge, lack jurisdiction in this matter and the City is entitled to summary disposition.

In this case, the parties argue, and the Administrative Law Judge agrees, that under *Walters v. Ramsey County*, 410 N.W.2d 343, 345 (Minn. App. 1987), the Administrative Law Judge does not have jurisdiction to hear the underlying merits of Mr. Gansen's discharge. Because no Civil Service Board or Commission or Merit System Authority exists in the City of Minnetrista, the discharge hearing will be held before a board of three persons. One member of the panel has already been appointed by the City, another member of the panel has already been appointed by Mr. Gansen, and the two parties initially agreed on the identity of the third member of the panel.<sup>3</sup>

The crux of the present dispute is which of the parties is responsible to pay what portion of the costs of the panel members. The City maintains it is appropriate to pay the costs of its appointee to the Board, but that the costs of the Veterans' appointee should be borne by Mr. Gansen. The City maintains also that costs for the third person appointed to the Board should be paid for by each side equally. The City subsequently proposed to pay the full costs of the fees and expenses of the third panel member if the Panel Member would agree to sign a document assigning to the City any right the arbitrator otherwise has to receive and collect one-half of his fees and expenses from Mr. Gansen. Mr. Gansen objected to the City's proposal.

After that Objection, the City filed a Petition in Hennepin County District Court requesting the appointment of a third person to the three person panel, but that Petition is still pending because the District Court has deferred until a decision on this Motion.

On July 12, 2012, Mr. Gansen filed a Petition for Relief with the Department of Veterans' Affairs alleging that the City, through its counsel, violated his VPA rights under Minn. Stat. §197.46. Specifically, the Petition alleges the City has refused to pay for the costs of the Veterans' Preference process, including the three panel board to which he is entitled under the statute. He alleged also that the City has stated it will consider his refusal to pay for half of the hearing process and panel costs a waiver of his statutory right to a three-person panel.

On June 5, 2012, counsel for the City sent an email to counsel for Mr. Gansen, asking:

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<sup>2</sup> Exhibit 1 to the Affidavit of Michael Waldspurger.

<sup>3</sup> The third panel member has declined to serve unless his compensation is guaranteed in advance, but the identity of the person has been established already, for the purposes of this Motion.

“Please contact me regarding whether Mr. Gansen is willing to agree to reduce his costs and the City’s costs by having a neutral arbitrator decide the case rather than a three-member panel. If he decides to proceed with a three-panel, Mr. Gansen is responsible for paying his panel member and for paying one-half of the costs of the third panel member.”

Counsel for the City followed with another email on June 15, 2012, stating in part:

“Finally, if costs is an issue, I would like to reiterate the City’s earlier offer to enter into an agreement to have a single person hear the case.”

The parties disagree as to the meaning of the emails quoted above. Counsel for Mr. Gansen argues that the language used by the City indicates that the City is conditioning Mr. Gansen’s request for a hearing upon his agreement to pay for a portion of the hearing costs, and that if the Petitioner will not agree to pay for a portion of such costs, then the only other option offered is to proceed with an arbitration hearing. Counsel for the City argues that the emails excerpted above were merely offers extended to Mr. Gansen in order to expedite the proceeding and to come to a resolution as early as possible because the City is obligated to pay him his salary until the matter is decided.

In that connection, while the City is willing to pay the costs for a single arbitrator, Gansen has declined that offer because the scope of review of an arbitrator’s decision is narrower than that for reviewing the decision of a Panel.

The City argues that, absent a specific directive in statute to the effect that the City is liable for the costs of the three-person board, that it is not liable for any more than the expenses of its own appointee and half the expenses of the joint appointee, leaving half of the costs the responsibility of Mr. Gansen.

Minn. Stat. §197.481, subd. 5, provides that all costs incurred by the Commissioner under that section (Enforcement, including hearing costs) shall be borne by the affected political subdivision. The City argues that omission of comparable language from Section 197.46 indicated legislative intent not to place costs of the Panel on the City. The Administrative Law Judge cannot agree. The City cites examples of government entities with established Civil Service Boards or Commissions, or Merit System Authorities, whose members are not compensated. However, in governmental entities where members of such bodies are compensated for their service, it is clear that expense would be incurred by the government entity for the conduct of any hearings performed by those Boards, Commissions or Authorities.

The Veterans’ Preference Act provides a person in the position of Mr. Gansen a hearing without any limitations on his rights to that hearing. The obligation to provide the hearing is not conditioned upon the payment of expenses. Minn. Stat. §197.46 states, in relevant part:

“[No] veteran separated from the military service under honorable conditions shall be removed from ... employment except for incompetency or misconduct shown after a hearing.”

Gansen argues that use of the word “shall” is an indication from the legislature mandating that one of the benefits provided to military veterans is a hearing if the employer wishes to discharge them for misconduct or incompetency. He argues further that if a veteran indicates he wants to exercise the opportunity for a hearing that he shall be entitled to it, without qualification.

Mr. Gansen argues also that Minnetrista claims that it has done enough by informing the Petitioner that he is entitled to a hearing.

The logical extension of such a claim is that the benefit conferred on Mr. Gansen by statute will not be there if he does not pay for part of it.

Mr. Gansen notes that, under the City's argument, it would become impossible in some cases for veterans to exercise their rights and certain veterans would be forced to waive their rights because they may not be able to afford the hearing costs. If a financially distressed veteran happens to be employed by an entity that does not have a Civil Service Board or Commission or Merit System Authority, and the veteran is obligated to pay a portion of the hearing costs, the language and intent of the statute giving a right of hearing would not be met.

The Administrative Law Judge agrees with the public policy analysis set forth in Mr. Gansen's brief. That is, the intent of the VPA is that veterans are entitled to the benefit of a hearing if an employer wishes to discharge them for misconduct or incompetence. From there, it seems reasonably clear that the policy does not state that a veteran is entitled to a three-member board only if he is able to pay to receive that benefit.

Veterans employed by governmental subdivisions who have established Civil Service Boards or Commissions, or Merit System Authorities, are entitled to hearings before such bodies before removal or discharge can be final. If the Veteran worked for a government subdivision that does not have such entities, the comparable hearing shall be held by a board of three persons appointed according to the statute. To impose a monetary threshold before hearing rights become available to a Veteran employed by one type of governmental subdivision versus another arguably constitutes a denial of such a Veteran's rights to equal protection of the law.

The City relies on a 1968 Attorney General's opinion to the effect that compensation for all members of the three-member board is within the discretion of the City. As suggested by counsel for the Petitioner, the Attorney General's opinion is not binding on this Administrative Law Judge. Attorney General opinions interpreting Minn. Stat. Chapter 197 have not been given the force of law. <sup>4</sup>

To emphasize that he has an unqualified right to a hearing, Gansen cites a 2001 position paper issued by the Minnesota Association of Counties, in addition to his interpretation (above) of relevant statutory language. <sup>5</sup> In the "Penalties and Costs" section, the Association's briefing paper notes:

"The employer is responsible for all costs of the hearing process regardless of whether or not it prevails."

The same language to the effect that the employer is responsible for all costs of the hearing process, regardless of whether or not it prevails, appears in the the "Penalties" section of a similar briefing paper issued by the League of Minnesota Cities in 2009. <sup>6</sup>

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<sup>4</sup> *City of Brainerd v. Brainerd Investment Partnership*, 812 N.W.2d 885, 891 (Minn. App. 2012).

<sup>5</sup> Affidavit of Kelly Dohm, Exhibit B.

<sup>6</sup> Affidavit of Kelly Dohm, Exhibit A.

Counsel for Gansen points out also that under *Klimek v. Effington Township*<sup>7</sup>, the Office of Administrative Hearings, through Administrative Law Judge John Lunde, held that:

“Under §197.46 a veterans’ preference hearing must be held before petitioner may be discharged. No law requires the petitioner to pay any costs related to that hearing.”

Mr. Gansen filed a 1998 letter from Gerald Bender, Veterans Preference Officer with the Department of Veterans Affairs, which sets forth the position of the Department of Veterans Affairs on panel costs pursuant to Minn. Stat. §197.46. That letter stated:

“The affected political subdivision is responsible for the entire costs of the three-member panel.”

Mr. Bender’s letter is relevant, persuasive authority because it states the position taken by the Department with final decision making authority in this case.

Mr. Gansen notes also that a Wright County District Court opinion from 1987<sup>8</sup> held that the political subdivision is responsible for the full costs of a three member panel pursuant to Minn. Stat. §197.46.

The ALJ concludes that the authorities and precedents cited by Mr. Gansen are more persuasive than the 1968 Attorney General’s Opinion cited by the City.

The ALJ is not persuaded by the City’s assertion that Mr. Bender, Judge Lunde or the Wright County District Judge engaged in impermissible rulemaking by placing financial responsibility for a three-person panel on government subdivisions. Rather, their positions are better characterized as resulting from statutory interpretation.

The request for attorney’s fees by Mr. Gansen is denied because litigants generally are not entitled to recover attorney’s fees, absent specific statutory authority to do so. The Veterans Preference Act, Minn. Stat. §197.46 is silent as to attorney’s fees, so the Administrative Law Judge declines to recommend that they be awarded. The Administrative Law Judge is aware of no authority for an award of attorney’s fees to a veteran whose veterans’ preference rights have been violated. Therefore, it is recommended that the request for attorney’s fees in this matter be denied.

Mr. Gansen’s Petition seeks the following relief:

“The City of Minnetrista is held responsible for all costs of the hearing process regardless of whether or not it prevails.

Attorney and legal costs associated with this Petition are awarded to Petitioner, Allan Gansen.”

In his Orders and Recommendation, the Administrative Law Judge recommended that the Commissioner deny Minnetrista’s Motion for Summary Disposition, hold the City responsible

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<sup>7</sup> OAH Docket No. 8-3100-11389-2 (2/2/1998)

<sup>8</sup> *Hirsch v. ISD 880*, Wright County Court File C2-87-667 (7/30/1987).

for all costs of the three-member panel, and that the request by Mr. Gansen for an award of attorney's fees be denied.

In the "factual situation" portion of his Petition, Mr. Gansen alleged that the City violated his VPA rights by refusing to pay the costs of the Veterans Preference hearing process, including the "three panel board" to which he is entitled under Minn. Stat. §197.46, and that it further stated it will consider his refusal to pay for half the hearing process and panel costs as a waiver of his right to a three-person hearing panel.

In its Order for Hearing, the Agency states Mr. Gansen's allegations to be that the City knowingly established arbitrary and capricious conditions to conducting a hearing by requiring him to agree either to have the matter arbitrated (and he waives his VP hearing rights), or that he sign an agreement to pay a portion of the Minn. Stat. §197.46 Veterans' Preference Hearing costs, regardless of the outcome of the hearing.

Even if the issues in the case are framed as stated above, an Order requiring the City to pay all hearing costs resolves them.

**R.C.L.**

## **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Larry W Shellito, Commissioner of Veterans Affairs, 20 W 12<sup>th</sup> Street Second Floor, St. Paul, MN 55155, (651) 296-2562 to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a.

Under Minn. Stat. § 14.62, subd. 1, the Commissioner is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.